

Supreme Court, U.S.

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In the
Supreme Court of the United States

THOMAS O'CONNOR; ANDREW STROBL,
Petitioners,

v.

WASHBURN UNIVERSITY; BOARD OF REGENTS OF
WASHBURN UNIVERSITY; JERRY B. FARLEY,
individually and in his official capacity as
President, Washburn University,
Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. Box 393
ANN ARBOR, MI 48106
(734) 827-2001

Counsel for Petitioners

QUESTIONS PRESENTED

This case presents an Establishment Clause challenge to an anti-Catholic display on government property and an opportunity for this Court to clarify its muddled Establishment Clause jurisprudence. Many, including Justices on this Court, believe that the Court's modern Establishment Clause jurisprudence is in "hopeless disarray." *See, e.g., Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment). Justice Kennedy's prediction in *Allegheny County* appears to have come true: "[A] jurisprudence of minutiae" relying on "little more than intuition and a tape measure" has resulted from the unclear and inconsistent analyses offered in the various opinions of this Court. *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 674-75 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

This is a case of first impression in that this Court has not had occasion to address an Establishment Clause challenge to a display that is hostile to religion. Petitioners suggest that for cases such as this, a traditional strict scrutiny analysis should apply. This approach is consistent with our Nation's history and traditions and with established precedent, which "forbids hostility toward any" religion. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). A strict scrutiny standard also provides a well-established and workable analytical framework within which to evaluate hostility claims under the Establishment Clause.

In the alternative, an evenhanded application of the present Establishment Clause jurisprudence compels a reversal in this anti-Catholic display case.

1. Should a strict scrutiny analysis apply for Establishment Clause challenges to government action that is hostile to religion, requiring a reversal in this case?
2. Does the evenhanded application of Establishment Clause jurisprudence compel a reversal in this hostility to religion case?

PARTIES TO THE PROCEEDING

The Petitioners are Dr. Thomas O'Connor and Andrew Strobl ("Petitioners").

The Respondents are Washburn University, the Board of Regents of Washburn University, and Washburn University President Dr. Jerry B. Farley, individually and in his official capacity ("Respondents").

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PETITION FOR WRIT OF CERTIORARI**OPINIONS BELOW**

The opinion of the three-judge panel, App. 1a, appears at 416 F.3d 1216. The district judge's opinion, App. 28a, appears at 305 F.Supp.2d 1217 (D. Kansas 2004).

JURISDICTION

The opinion of the panel was issued on July 28, 2005. A request for an extension of time in which to file this petition was granted, requiring that the petition be filed on or before December 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE**I. FACTUAL BACKGROUND.**

This case is an Establishment Clause challenge to a government display of an anti-Catholic religious symbol on the property of Washburn University, a public, municipal university located in Topeka, Kansas. On or about September 20, 2003, Washburn University began displaying at one of the most prominent and public outdoor locations on its campus a religious symbol entitled, "Holier than Thou."

"Holier than Thou" is a sculpture of a Catholic bishop with a grotesque facial expression wearing a distorted miter that resembles a phallus. See App. 26a (Attachment). A miter is a head covering worn by the pope and bishops as a mark of their office and is a symbol of the ecclesiastical authority of the Roman Catholic Church.

Inscribed on "Holier than Thou" are the words, "The Cardinal." A Cardinal is a Roman Catholic bishop who holds a particular office of importance in the Catholic Church. Cardinals are selected by the pope, and they are responsible for electing the next pope—the next successor of Peter—to lead the Church.

The Catholic bishop depicted in "Holier than Thou" is wearing a stole, which is a religious garment worn by Catholic priests and bishops when ministering the Sacraments, including the Sacrament of Penance. The "Holier than Thou" caption read as follows:

The artist says, "I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

When a bishop or priest is ministering the Sacrament of Penance he is not in his own person. Instead, he is "in persona Christi," or "in the person of Christ." Moreover, it is heretical to claim that the priest or bishop has "the power to condemn [the penitent] for [his] evil ways."

Thus, "Holier than Thou" conveyed a message that mocks God the Father, attacks the Sacrament of Penance, attacks the ecclesiastical authority of the Roman Catholic Church, and attacks the role Christ plays in the Sacraments. A reasonably informed Catholic would recognize and understand the anti-Catholic message conveyed by "Holier than Thou."

On October 2, 2003, Catholic Archbishop James Keleher of the Archdiocese of Kansas City in Kansas wrote an open letter to the president of Washburn University, Respondent Farley, expressing his shock and disappointment and strongly urging Washburn University to remove this symbol of anti-Catholicism. In his letter, the Archbishop wrote, "I am surprised and dismayed that the university would allow such a piece which many recognize as not only insensitive and insulting but even obscene to be part of an even temporary beautification." He stated further, "I am extremely disappointed at this present situation that is an affront to me, to many Catholics and to others who value decency and respect. I am particularly concerned for your many Catholic students who see their faith ridiculed and they themselves embarrassed. . . . The presence of this piece sends a strong message to your students and the broader community and I believe that message to be both offensive and damaging." The Archbishop concluded, "I cannot express strongly enough my dismay and disappointment with this situation and I sincerely and respectfully request and urge the university to take appropriate action by removing this symbol that is so very offensive and contradictory to some of the basic values of our society. That is the only decent and respectful thing to do."

The Archbishop's letter came three days after Washburn University issued a press release to the public supporting its decision to publicly display "Holier than Thou" on its

campus. Other Catholic organizations, such as the Catholic Campus Center at Washburn University and the Catholic League for Religious and Civil Rights, expressed similar concerns about this anti-Catholic display.

“Holier than Thou” stood alone between the Student Union, the hub of student life on campus, and Morgan Hall, the main administrative building. This location is one of the most heavily trafficked areas on campus, and it was selected so that this symbol would have a greater effect on the viewer.¹ Moreover, the physical location of this religious symbol is not a location in which all were free to place their private displays. Washburn University has absolute control over the messages conveyed by unattended displays at this location on campus.

“Holier than Thou” was not part of a larger display of religious art or artwork with a religious theme. And there were no other pieces of art within the same physical setting of “Holier than Thou.” The closest sculpture was a permanent, rotund-shaped piece of concrete located thirty-three feet away behind some bushes.

“Holier than Thou” was selected by the Campus Beautification Committee (“CBC”) as part of Washburn University’s eighth annual outdoor sculpture exhibition. The CBC is a Washburn University committee whose members are appointed by the university’s president. This selection received the approval of President Farley, who has the

¹ This religious symbol was not placed in the Washburn University museum where students could voluntarily go to view it. Rather, it was placed at an outdoor location where students and others were forced to walk by it during the course of the day.

authority to oversee the decisions of the CBC and to move any pieces selected for display. Furthermore, the decision to display "Holier than Thou" was ratified on October 18, 2003, by the Board of Regents of Washburn University, the governing body and policy-making authority of the university.

The CBC is charged with making Washburn University a beautiful campus for students, faculty, and the public at large—its primary purpose is to promote Washburn University. The outdoor exhibit is a nonacademic program—students did not receive academic credit for the display of "Holier than Thou" and "Holier than Thou" was not part of Washburn University's curriculum. In fact, students had no part in the decision to display "Holier than Thou"—Washburn University was solely responsible for its selection and display. Any message conveyed by "Holier than Thou" constituted a Washburn University endorsed message. Thus, this was not a display of student art nor a display made pursuant to a particular course offered at Washburn University, and "Holier than Thou" was not selected by a student for academic credit—students had no part in the selection process. This was a display that was selected, sponsored, promoted, and advertised to the public as a Washburn University display. And it was a display that was supported with public funds.

Despite having full knowledge of the offending nature of this anti-Catholic religious display, Respondents refused to remedy the harm they caused to Catholics. Instead, the decision to display "Holier than Thou" was ratified by the Board of Regents on October 18, 2003. Moreover, at no time did Washburn University or its officials disclaim any message conveyed by "Holier than Thou." There was no disclaimer posted at or near the anti-Catholic religious symbol, and there was no disclaimer in any of the university's official statements

or advertisements. Indeed, rather than disclaiming the anti-Catholic message conveyed by this religious symbol, Respondents embraced the message, focusing on the controversy this symbol created and claiming that such controversy benefits the university.

Remarkably, Respondents embraced the controversy created by this divisiveness despite the fact that their own policies prohibit discrimination or harassment of students and faculty on the basis of religion, recognizing that such harassment creates a hostile educational and working environment and undermines the university's educational goals. Moreover, Respondents conceded that an artistic KKK statue to commemorate the supremacy of the Aryan race would not be displayed on the campus at Washburn University because it would convey an offensive message to some. Similarly, "works of art" that conveyed "anti-black," "anti-Jewish," or "anti-gay/lesbian" messages would not find their way onto the campus.

Petitioners are devout Catholics who have been deeply hurt and harmed by the public and prominent display of this anti-Catholic symbol. Petitioner O'Connor, a tenured professor of thirty-nine years at Washburn University and a respected member of the faculty, had been relegated to the status of a second-class citizen, forced to use the "back door" of the university because of his religious beliefs. Petitioners, who had regular contact with "Holier than Thou" on account of their respective duties and responsibilities as a professor and student, had to alter their behavior as a direct result of Respondents' decision to display this anti-Catholic symbol at its prominent outdoor location. As a consequence, Petitioners suffered irreparable harm because of this anti-Catholic display.

II. PROCEEDINGS BELOW.

Petitioners sought a temporary restraining order, which was denied. By consent of the parties, the district court consolidated the preliminary injunction hearing with the trial on the merits. After a two-day hearing, the district court entered judgment for Respondents. Petitioners filed a timely notice of appeal.

A Tenth Circuit panel dismissed Petitioners' claims for injunctive and declaratory relief as moot and, as a consequence, vacated the judgment of the district court as to those claims for lack of subject matter jurisdiction. As to the remaining claim for nominal damages, the panel affirmed the district court's decision, holding that the placement of "Holier than Thou" on Washburn's campus under the circumstances did not constitute an unconstitutional endorsement of an anti-Catholic message.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO INCONSISTENT RESULTS.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring), and in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring in the judgment) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (criticizing the Court's

"embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

Inconsistent results in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *A.C.L.U. v. Schundler*, 168 F.3d 92, 113 (3rd Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's

confusing and confused Establishment Clause jurisprudence.”).

This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing, for the first time, a case involving hostility to religion. For the reasons set forth more fully below, Petitioners suggest that for cases involving displays of religious symbols with traditional significance and historical meaning, such as the crèche and the Ten Commandments, this Court should adopt a rational basis standard of review. And for cases involving displays that convey hostility to religion, such as the one presented here, a strict scrutiny standard should apply. Such an approach is consistent with our history and traditions and the construct of the First Amendment, and it provides a well-established analytical framework within which to evaluate Establishment Clause claims. This framework would provide needed guidance for the lower courts.

A. The Establishment Clause Permits Acknowledgment of Religion, but Forbids Hostility Toward Any.

“We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion’s role in American life. *Van Orden v. Perry*, 125 S.Ct. 2854, 2861 (2005) (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded National Holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto,

"In God We Trust," the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 125 S.Ct. at 2854; *see also Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Court concluded its recitation of examples of government recognition of religion by stating,

One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." [Zorach, 343 U.S. at 314].

465 U.S. at 677-78 (emphasis added).

As noted by this Court as recently as last term, "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden*, 125 S.Ct. at 2861-62 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist.*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36

(O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

The use of religious symbols has long been a part of government and remains so today. *See, e.g., Van Orden*, 125 S.Ct. at 2862 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Thus, government action, such as the erection of a Christmas holiday display incorporating religious themes as an example, merely recognizes the broad Christian tradition to which many members of this society belong. *See Lynch*, 465 U.S. at 686 ("To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings."). Similarly, the display of the Ten Commandments has historical precedent and meaning. *Van Orden*, 125 S.Ct. at 2863 (noting that while the Ten Commandments are religious, "they have an undeniable historical meaning"). Attempts to suppress this recognition and historical acknowledgment are the antithesis of the value of religious tolerance that underlies the Establishment Clause. *See, e.g., Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

Thus, while government's use of religious symbols is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, the use of symbols that are hostile to religion does not enjoy such a favorable history and should, therefore, be treated differently under the law. In *Lynch*, the Court clearly articulated this bedrock principle:

It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Lynch, 465 U.S. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

Therefore, this Court should adopt a rational basis standard of review for religious displays that have historical meaning. This standard would be consistent with the history and traditions of our Nation and the framework of the First Amendment, and it would provide a well-established test for the lower courts to apply. In comparison, displays that are

hostile to religion, such as the one presently before this Court, do not share the same history and tradition and should therefore be treated under a higher standard of review.

B. This Court Should Adopt a Strict Scrutiny Standard of Review for Government Actions That Are Hostile to Religion under the Establishment Clause.

Because the Constitution forbids hostility toward a particular religion or of religion in general, such practices should be judged under the Establishment Clause by applying a strict scrutiny standard of review. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying strict scrutiny to strike down a law under the Free Exercise Clause that targeted a particular religion). Thus, a government action that is hostile to religion, such as the display at issue here, should be held "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533.

In the present case, Respondents have not advanced a compelling interest that is promoted by their hostile display and certainly not one that is narrowly tailored. Any academic discussions or other educational programs benefitted by having a display that is anti-Catholic could still have occurred had this religious symbol been moved to an area where students and faculty were not forced to confront it, such as in the art museum or a classroom. This would have satisfied whatever educational goal that Respondents sought to achieve by this offensive display. Indeed, the public and prominent display of "Holier than Thou" plainly did not create a positive

educational experience for the Catholics on campus. And Respondents' own policies prohibit discrimination or harassment of students and faculty on the basis of religion, recognizing that such harassment creates a hostile educational and working environment. Thus, this offensive display actually undermined the university's educational goals.

In the final analysis, a prominent display of an anti-Catholic symbol is not the equivalent of a class discussion of ideas, and because this was a government display there are no academic freedom or freedom of speech issues. Therefore, this display offered no valid educational benefits sufficient to satisfy a compelling interest.

Additionally, whatever aesthetic interests Respondents might have in creating a "beautiful campus," those interests are not compelling. *See Freedom from Religion Found. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (finding that the city's purpose to "beautify" the park by displaying a religious statute was not a valid secular purpose under the Establishment Clause); *cf. Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (holding that aesthetics was not a compelling interest sufficient to infringe upon First Amendment values).

Thus, there is no discernible compelling interest that would permit the government to publicly mock the Catholic faith in the way that Washburn University has done in this case. Therefore, upon application of a strict scrutiny standard of review, this Court should reverse the lower court.

II. THE EVENHANDED APPLICATION OF ESTABLISHMENT CLAUSE JURISPRUDENCE COMPELS A REVERSAL IN THIS CASE.

Regardless of whether this Court adopts a new test for reviewing religious display cases, the evenhanded application of the Court's present Establishment clause jurisprudence compels one conclusion: Respondents' publicly funded and prominently displayed anti-Catholic religious symbol violates the United States Constitution.

There can be only one Establishment Clause standard—as flawed as it may be. If the display of a crèche or the Ten Commandments—both of which are passive symbols of cultural and historical significance—can be deemed unconstitutional by the highest courts in this land, then certainly the public display of an overtly anti-Catholic religious symbol by the government must receive the same fate.

The Establishment Clause applies to state governments and their political subdivisions, such as Respondents, by operation of the Fourteenth Amendment. *See Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). Moreover, from a constitutional perspective, Respondents' decision to publicly and prominently display this publicly funded religious symbol on the property of Washburn University is a choice attributable to the state. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was a choice attributable to the state, and from a constitutional perspective it was as if a state statute decreed that the prayer must occur). Furthermore, the Board of Regents, the governing body and

policy-making authority of the university, ratified this decision on October 18, 2003.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or “advance” religion, *see, e.g.*, *County of Allegheny*, 492 U.S. at 592, but also actions that tend to “disapprove” of, “inhibit,” or evince “hostility” toward religion. *See Edwards*, 482 U.S. at 585 (“disapprove”); *Lynch*, 465 U.S. at 673 (“hostility”); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (“inhibi[t]”). Indeed, our Constitution prohibits government action that “foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.” *Rosenberger*, 515 U.S. at 846; *see Lynch*, 465 U.S. at 673 (stating that the Constitution “forbids hostility toward any” religion).

A state-sponsored message of disapproval of Catholic religious beliefs and practices sends a message to Petitioners and other Catholics that their firmly held religious convictions are disfavored in the community. *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”). The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (striking down a law that targeted a particular religious practice).

A. Application of the Present Establishment Clause Jurisprudence.

The *Lemon* test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), while still used, has been widely criticized and often modified. *See, e.g., Lamb's Chapel*, 508 U.S. at 398-400 (Scalia, J., concurring in the judgment). Nevertheless, it still serves as the benchmark for Establishment Clause analysis and is the test that generally guides decisions under the Establishment Clause. *See McCreary County v. A.C.L.U.*, 125 S.Ct. 2722 (2005) (refusing to abandon *Lemon*'s purpose test and holding that the display of the Ten Commandments violated the Establishment Clause); *but see Van Orden*, 125 S.Ct. at 2854 (upholding the display of the Ten Commandments in an Establishment Clause case decided the same day as *McCreary* and noting that the *Lemon* test was "not useful" to its analysis).

Under the *Lemon* test, government action is unconstitutional if any one of the following apply: (1) it does not have a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Lemon*, 403 U.S. at 612-13.

In her concurring opinion in *Lynch*, Justice O'Connor refined the *Lemon* test. *See Lynch*, 465 U.S. at 687-94. This refinement is often described as the endorsement test. In the present context, this test seeks to determine whether the challenged government action, regardless of the government's intent or purpose, conveys a message of disapproval of or hostility toward a particular religion or religious belief. *See generally County of Allegheny*, 492 U.S. at 593. As the Court explained, "Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the

challenged governmental action is sufficiently likely to be perceived . . . by the nonadherents as a disapproval, of their individual religious choices.’’ *Id.* at 597 (citations omitted).

As the evidence in this case demonstrated, Respondents’ public and prominent display of “Holier than Thou” was “sufficiently likely to be perceived . . . by [Catholics] as a disapproval of their religious choices,” in violation of the Establishment Clause.

Moreover, “the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) (internal quotations and citations omitted). Therefore, Respondents cannot avoid Establishment Clause liability by merely claiming that it was a “process” that brought “Holier than Thou” to its prominent location on campus. *See id.*

Finally, there is no “Establishment Clause immunity” for a public university, *see, e.g., Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (noting that the interest of the University of Missouri at Kansas City, a state university, in complying with the Establishment Clause may be characterized as “compelling”—the law that applied to the chief justice of the Alabama Supreme Court, *see Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (holding unconstitutional the display of the Ten Commandments in a state judicial building), is the same law that applies to Respondents.

Thus, the law that makes it unconstitutional to display the Ten Commandments—the moral foundation of law—in a public school, *see Stone v. Graham*, 449 U.S. 39 (1980), or a state judicial building, *see Glassroth*, 335 F.2d at 1282, or to publicly display a crèche during Christmas, *see County of*

Allegheny, 492 U.S. at 573, a National Holiday, is the same law that must be applied here. Moreover, the state-sponsored hostility toward or mocking of one's religion, as in this case, is far more egregious and harmful than the simple public recognition of religion held unconstitutional by the many Ten Commandments and crèche cases. If the courts are going to maintain and apply a flawed Establishment Clause jurisprudence, then they must do so evenhandedly. Because a state is not permitted to "promote" or "endorse" religion through the public display of religious symbols, it cannot likewise demonstrate hostility or disfavor toward one particular religion through the public display of an anti-Catholic religious symbol, as in this case.

B. The "Purpose" And "Effect" Of Respondents' Anti-Catholic Religious Display Are Unconstitutional.

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid." *See Lynch*, 465 U.S. at 690 (O'Connor J., concurring in the judgment).

1. The Actual "Purpose" Of Respondents' Anti-Catholic Religious Display IS Unconstitutional.

"While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 586-87. The secular purpose requirement "reminds government that when it acts it should

do so without endorsing [or disapproving] a particular religious belief or practice" *Wallace*, 472 U.S. at 75-76 (O'Connor, J., concurring in the judgment).

In *Edwards*, for example, the Court struck down a Louisiana law that prohibited the teaching of evolution in public elementary and secondary schools unless accompanied by instruction in creation science, holding that the law's primary purpose was unconstitutional. *Edwards*, 482 U.S. at 592. The Court rejected the government's claimed secular purpose of providing a more comprehensive science curriculum and stated, "Such a ban on teaching does not promote—indeed, it undermines—the provision of a comprehensive scientific education." *Id.* at 587. The Court held that the law's actual purpose was to advance a particular religious belief in violation of the Establishment Clause. *Id.* at 593; *see also Stone*, 449 U.S. at 39-41 (holding that the posting of the Ten Commandments on schoolroom walls violated the Establishment Clause and finding that the display of this religious symbol "had no secular legislative purpose," even though the government clearly stated that its purpose for the display was educational); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-10 (rejecting school district's claim that their policy of permitting student-led, student-initiated messages or invocations prior to football games fostered free expression of private persons, solemnized sporting events, promoted good sportsmanship and student safety, and established an appropriate environment for competition, claiming that the policy did not actually advance them).

Indeed, the case law makes clear that courts will ignore the government's stated purpose when it is either illegitimate or the government practice in question does not actually advance it. Moreover, rather than the government's "stated" purpose, courts will scrutinize the government's "actual"

purpose, as the facts of the particular case would tend to demonstrate. Therefore, this Court need not accept Respondents' self-serving statements as the only basis for evaluating whether the display of "Holier than Thou" had "a valid secular purpose." Rather, this Court can and should look at the context of the dispute and determine what purpose is actually being advanced by Respondents' actions in this case.

As the evidence showed, Respondents were well aware of the anti-Catholic message that was conveyed by "Holier than Thou." They were aware of this as early as September 23, 2003, when Respondent O'Connor met with Dr. Wasserstein, the vice president for academic affairs at Washburn University. Dr. Wasserstein's comment to Respondent O'Connor at the onset of this meeting was "I'm surprised it took you so long to get here, I knew you would be very upset."

Moreover, on October 2, 2003, Archbishop Keleher sent a letter to President Farley, strongly urging the university president to remove this offending religious symbol. President Farley received similar letters from the Catholic Campus Center at Washburn University and the Catholic League. With full knowledge of the offending anti-Catholic message, Respondents did not even issue a disclaimer. Rather, they embraced the message as a meaningful contribution to the "marketplace of ideas" at Washburn University.

Any alleged educational "purpose" is particularly disingenuous given that Respondents' own policies make clear that creating an educational or working environment that is hostile to a student or faculty member or discriminates against them on account of their religion does not advance any

legitimate educational goal. Indeed, Respondents could have achieved their alleged "purpose" by moving the anti-Catholic symbol or removing it all together. As such, like the policy at issue in *Edwards*, the decision to publicly and prominently display this anti-Catholic religious symbol does not promote—indeed, it undermines—any legitimate educational goal.

Furthermore, Respondents' purpose of enhancing the beauty of the public campus serves no valid secular purpose sufficient to withstand an Establishment Clause challenge. *See Freedom from Religion Found.*, 203 F.3d at 493 (finding that the city's purpose to "beautify" the park by displaying a religious statue was not a valid secular purpose). And the fact that Respondents chose a religious symbol that was also a "work of art" by a noted artist and approved by the CBC does not change the result. "Holier than Thou" is simply an "artistic" anti-Catholic religious symbol. *See Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1421 (7th Cir. 1993) ("When a religious symbol is erected for a religious purpose, the fact that it is also a 'work of art' designed by a noted architect and approved by an art commission does not change its purpose. It simply is an attempt to create an aesthetically pleasing religious symbol; it does not obviate its religious purpose.").

Therefore, Respondents' decision to display "Holier than Thou" is unconstitutional because their actual purpose is to disapprove of the Catholic religion and its beliefs and practices in violation of the Establishment Clause.

2. The “Effect” Of Respondents’ Anti-Catholic Religious Display IS Unconstitutional.

The “effect” of Respondents’ anti-Catholic display, irrespective of any alleged “purpose,” clearly conveyed a message of disapproval of Catholicism in violation of the Establishment Clause. *See Lynch*, 465 U.S. at 690 (O’Connor J., concurring in the judgment) (“The effect prong asks whether, irrespective of the government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”).

The “effect” analysis here is actually the interpretation of the second prong of the *Lemon* test. *See id.* This “endorsement test,” as it is also known, precludes government from conveying or attempting to convey a message that a particular religion or religious belief is disfavored. *See generally County of Allegheny*, 492 U.S. at 593. This test forbids hostility toward a particular religion. *See Lynch*, 465 U.S. at 673 (stating that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”).

According to Justice O’Connor:

What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Id. at 692 (O’Connor, J., concurring in the judgment) (emphasis added).

The “endorsement test” in this context would ask whether a reasonable observer would find that Respondents’ display had the effect of disfavoring a certain religion. *See County of Allegheny*, 492 U.S. at 593-94, 599-601. Moreover, this is an informed reasonable observer who is aware of the history and context of the forum in which the challenged government conduct occurs. *See generally Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that the state did not violate the Establishment Clause by permitting a private party, the KKK, to display an unattended cross on the grounds of the state capitol, a public forum for private speech and not a forum reserved for official use); *see also County of Allegheny*, 492 U.S. at 599-600, n. 50 (holding that the private display of a crèche on the “Grand Staircase” violated the Establishment Clause and noting that “[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays”).

Thus, the reasonable observer in the present case would be aware that no one other than Washburn University is permitted to place an unattended display where “Holier than Thou” was located. This outdoor location is an area that has been reserved for specific official use. Therefore, an informed reasonable observer, aware of the history and context of this forum, would ascribe any message conveyed by such a display to the university (i.e., the government). And the message conveyed by “Holier than Thou” is a religious message and one that is negative toward the Catholic faith.

Undoubtedly, the constitutionality of a religious display depends upon its particular physical setting. *See, e.g., Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001) (holding unconstitutional the public display of the Ten Commandments and stating, “Nothing in the

context of the monument itself or the surrounding grounds mitigates the religious message conveyed. . . . There are no other monuments or statues directly near this one and there is no unifying historical or legal significance between this monument and the others") (emphasis added); *Joki v. Board of Educ.*, 745 F.Supp. 823, 829-32 (N.D.N.Y. 1990) (analyzing the physical setting and context of the religious art and finding nothing that negates endorsement or neutralizes the effect of the religious message); *see also Washegesic v. Bloomingdale Public Schs.*, 33 F.3d 679, 684 (6th Cir. 1994) (noting that "the case would be different if the school had placed representative symbols of many of the world's great religions on a common wall").

For example, in *Lynch*, the Court held that the City's inclusion of a crèche in its holiday display did not violate the Establishment Clause. *Lynch*, 465 U.S. at 668. In so holding, the Court found it important that the actual physical setting of the display contained many secular symbols of the holiday season. *Id.* at 671. Moreover, this display, which had been part of the City's holiday display for more than forty years, was situated in a park owned by a nonprofit organization and located in the heart of the shopping district. *Id.* As a result, Justice O'Connor concluded that the display "cannot fairly be understood to convey a message of government endorsement of religion," noting that "[i]t is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its

annual Christmas display for some years.”² *Id.* at 693 (O’Connor, J., concurring).

In comparison, in *County of Allegheny*, the Court held that the County violated the Establishment Clause by permitting the Holy Name Society, a private, Catholic group, to display a crèche on the “Grand Staircase” of the county courthouse.³ *County of Allegheny*, 492 U.S. at 573. The Court found it significant that the location of the display was the “main,” “most beautiful,” and “most public” part of the courthouse, which housed many of the important county administrative offices. *Id.* at 579. The Court noted that “the Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time” and that “the county’s own press release made clear to the public that the county associated itself with the crèche.” *Id.* at 599-600, n.50.

In the present case, “Holier than Thou” stood alone on the “main” area of campus, assuming its position of prominence outside of the Student Union and across from Morgan Hall, the main administrative building—further implying university approval. This location is one of the most heavily trafficked areas on campus. There were no other objects or symbols within its physical setting that negated or neutralized the

² Unlike the display at issue in *Lynch*, the display of “Holier than Thou” created tremendous political divisiveness as soon as it appeared.

³ The display bore a plaque stating: “This Display Donated by the Holy Name Society.” *County of Allegheny*, 492 U.S. at 580.

religious message conveyed by "Holier than Thou."⁴ There were no signs disclaiming its anti-Catholic message.⁵ And Respondents' own press release and advertisements contained no such disclaimers, but instead made clear to the public that Respondents associated themselves with this anti-Catholic religious symbol. Moreover, "Holier than Thou" was not located in a public forum; it was not displayed in an area in which all were free to place their displays for weeks at a time. It was displayed in an area in which Respondents control the messages conveyed by the symbols that are displayed.

In the district court's opinion, the court erroneously claimed that "Plaintiffs' arguments rely heavily on the knowledge a reasonable observer must possess about the

⁴ The panel's conclusions regarding the particular physical setting of "Holier than Thou" are clearly erroneous. The record before the court, as plainly shown in the photographs that were admitted into evidence, demonstrated that "Holier than Thou" stood alone at its prominent campus location; there were no other objects or symbols in view that would mitigate the religious message conveyed by this anti-Catholic sculpture. "Holier than Thou" was not part of a larger display of religious art or artwork with a religious theme. And there were no other pieces of art within the same physical setting of "Holier than Thou." The closest sculpture was a permanent, rotund-shaped piece of concrete located thirty-three feet away behind some bushes. This is not a museum setting, as the panel erroneously found. No reasonable observer would conclude that this is a "typical" museum setting by viewing this offensive display in its present physical setting, as the law requires.

⁵ Compare *Linnemeir v. Board of Trustees of Purdue*, 260 F.3d 757, 760 (7th Cir. 2001) (noting with significance that the university was scrupulous in its public disclaimers regarding the presentation of a play hostile to Christianity).

Catholic religion in order to find 'Holier than Thou' offensive" and therefore "refuse[d] to assign to the reasonable observer a certain quantitative state of Catholicism."⁶ See App. 48a-49a. In fact, the district court assigned no knowledge of religion, let alone the Catholic religion, to its "reasonable" observer. As a result, the district court's "informed reasonable observer" was an uninformed and unreasonable observer. The circuit court panel, however, sidestepped the issue, stating, "Regardless of whether the statue sends an anti-Catholic message, any reasonable observer viewing it in context would understand the university had not endorsed that message." App. 26a.

As the pictures in the record plainly showed, *see, e.g.*, App. 26a (Attachment), "Holier than Thou" depicts a Catholic cleric administering the Sacrament of Penance (apparently, the district court's "informed reasonable observer" was also blind or illiterate and therefore unable to read the caption or the inscription on the symbol). Moreover, is there any doubt that this religious symbol casts the Catholic faith in a bad light? Would an informed observer reasonably conclude that the title, "Holier than Thou," was a title of honor and respect? Of course he would not. This is plainly

⁶ At trial, Petitioners presented evidence that demonstrated in great detail the offensiveness of this religious symbol. It is common for courts to consider evidence that explains the religious significance of certain symbols. *See, e.g.*, *County of Allegheny*, 492 U.S. at 582-587 (explaining in great detail the historical and religious significance of the menorah); *Joki*, 745 F.Supp. at 823 (holding unconstitutional the display of a student painting on school property and relying on the testimony of several clergy who explained the religious significance of various features of the offending artwork).

a derogatory title, and one need not have any religious expertise to make that simple determination.

Moreover, one need not possess any expertise to notice the grotesque facial expression and the headgear that resembles a phallus. Indeed, it is plainly obvious that "Holier than Thou" is a religious symbol, and it is a symbol that expresses a negative message about the Catholic faith. *See, e.g., Gonzales*, 4 F.3d at 1418 (stating that "we are masters of the obvious" and finding that the crucifix is a religious symbol). And the fact that some who claim to be Catholic may not have been offended does not change the nature of this religious symbol or the illegality of Respondents' actions.⁷ *See, e.g., Washegesic*, 33 F.3d at 684 (holding unconstitutional the display of a copy of Warner Sallman's famous portrait, "Head of Christ," and stating, "Though the portrait, like school prayers and other sectarian religious rituals and symbols, may seem 'de minimis' to the great majority, . . . a few see it as a governmental statement favoring one religious group and downplaying others. It is the rights of these few that the Establishment Clause protects in this case.").

In the final analysis, an informed reasonable observer would conclude that Respondents conveyed a message of

⁷ Petitioners are unaware of any case involving the public display of religious symbols by the government in which the court noted that some atheists may not be offended by the public display of pro-religious symbols, such as the Ten Commandments or the crèche, and using that as justification for permitting the display. It is of no moment that some Catholics might not have found this display offensive. Petitioners, as well as many other Catholics, including the Archbishop, certainly did find offense, and their offense was justified.

disapproval of the Catholic religion and its beliefs and practices in violation of the Establishment Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. MUISE

Counsel of Record

Thomas More Law Center

24 Frank Lloyd Wright Drive

P.O. Box 393

Ann Arbor, Michigan 48106

APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 04-3103

[Filed July 28, 2005]

THOMAS O'CONNOR,)
Plaintiff-Appellant;)
)
ANDREW STROBL,)
Plaintiff-Appellant)
)
v.)
)
WASHBURN UNIVERSITY,)
Defendant-Appellee;)
)
BOARD OF REGENTS OF)
WASHBURN UNIVERSITY)
Defendant-Appellee.)
)

OPINION

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiffs-appellants Dr. Thomas O'Connor and Andrew Strobl filed suit under 42 U.S.C. § 1983 against Washburn University, the Washburn Board of Regents, and Washburn President Dr. Jerry B. Farley individually and in his official capacity, claiming a statue placed on the Washburn campus violated their rights under the First Amendment of the United States Constitution. The statue in question is entitled *Holier Than Thou* and depicts the head and upper torso of what appears to be a Roman Catholic bishop. *See Attachment.* Appellants argue the statue's presence on the campus of a public university constitutes an unconstitutional endorsement of an anti-Catholic message. They seek nominal damages as well as declaratory and injunctive relief.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court dismisses appellants' claims for injunctive and declaratory relief as moot and, as a consequence, vacates the judgment of the district court as to those claims since subject matter jurisdiction is now lacking. As to the remaining claim for nominal damages, this court holds that the statue's placement on Washburn's campus under these circumstances does not constitute an unconstitutional endorsement of an anti-Catholic message and therefore affirms the decision of the district court.

II. BACKGROUND

Washburn University is a municipal university in Topeka, Kansas funded by city and county taxes. The university is

governed by a nine-member Board of Regents, which is responsible for appointing the university president. The president has the authority to expend university resources and to place or remove works of art on the Washburn campus without approval.

Since 1996, Washburn's Campus Beautification Committee has selected approximately five statues each year for display in a temporary outdoor sculpture exhibition. The exhibition supplements the university's collection of twenty-five outdoor statues permanently situated on campus. President Farley appoints the members of the committee from the local community and from Washburn's faculty and staff. For the 2003 exhibition, the committee chose a three-member volunteer jury made up of art professionals to select works for display. The jury chose five sculptures from among the ninety submissions received.

One of the chosen statues, entitled *Holier Than Thou*, depicts a Roman Catholic bishop with a contorted facial expression and a miter that some have interpreted as a stylized representation of a phallus. The bronze statue measures thirty-seven inches high by twenty-seven inches wide and is inscribed with the words, "The Cardinal." Its caption reads:

The artist says, "I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

The jury's selections were approved by the committee and by President Farley. None of the other statues chosen for the exhibition involved obvious religious themes.

Greg Inkman, a member of the Campus Beautification Committee, was responsible for choosing where to display *Holier Than Thou* on campus. He placed the statue along a high-traffic sidewalk between the student union and the main administrative building, at a location used for other statues in past exhibitions. Inkman testified that he placed the statue near a sidewalk because it was a small piece with fine detailing that could not be appreciated from a distance. Four other works of art were displayed within 200 feet of the sculpture, the nearest being thirty-three feet away. A brochure, available at the campus art museum, pictured the works in the exhibition and included a map identifying the location of each. The area chosen for the statue was not generally open for the display of art by the public or the Washburn community.

Within days of installation, Washburn began receiving calls, letters, and e-mails complaining about *Holier Than Thou*. Washburn staff and students, including appellants, told university officials they were deeply offended and hurt by the statue's negative portrayal of the Roman Catholic religion. Other Catholics from across the nation also contacted Washburn to complain. The Archbishop of Kansas City wrote to President Farley that he was "surprised and dismayed that the university would allow such a piece which many recognize as not only insensitive and insulting but even obscene."

In response to the controversy, President Farley issued a press release explaining his refusal to remove the statue from campus. The press release read:

One of the pieces on display this year has engendered much discussion. People perceive and respond to art differently based on their individual backgrounds. No one involved in the selection process or in any aspect of the Campus Beautification Committee intended for any viewers to experience pain or hurt. We all regret if this has occurred.

One of the purposes of art is to engage us intellectually and emotionally. This work apparently has fulfilled that function as there is a wide variety of commentary on the piece, ranging from support to opposition.

There is no solution that will be satisfactory to everyone at this point. As a university, we should take this opportunity to create a positive educational experience. Seminars can be organized surrounding this work of art and its symbolism. Speakers could address the aesthetic elements, religious perspectives and issues facing contemporary religions. Different points of view must and can be represented so the seminars are a valuable educational opportunity for the campus and the community.

Soon after President Farley's press release, the Campus Beautification Committee called a special meeting to discuss the issue. During the meeting, committee members stated that they had not construed the statue to be anti-Catholic or the bishop's miter to be phallic when they selected it for exhibition. Several days later, the Board of Regents met to decide whether *Holier Than Thou* should be removed from campus. The board heard from speakers in support and in opposition to the statue. By a 5-2 vote, the regents decided to leave *Holier Than Thou* in place.

Appellants O'Connor and Strobl filed suit under § 1983, claiming the sculpture violated their rights under the Establishment Clause of the United States Constitution by conveying a message of state-sponsored disapproval of their religious beliefs. O'Connor is a tenured professor of biology at Washburn University. Strobl at the time the complaint was filed was a full-time student at Washburn who lived on campus at a student residence hall and served as president of the university's Catholic Campus Center. Both appellants are devout Catholics.

In their complaint, appellants claim the statue "mocks God the Father" and "attacks the sacrament of Penance, the ecclesiastical authority of the Roman Catholic Church, and the role Christ plays in the sacrament of Penance." They argue the contorted expression on the face of the statue, combined with a bishop's miter they believe represents a phallus, portrays the church in a negative light. Because Catholics believe that priests are "like the living image of God the Father," appellants contend that the statue mocks God as well as the Catholic religion. Furthermore, appellants claim the bishop depicted in the statue is in the act of administering the sacrament of Penance, a time when the priest is "in persona Christi," or "in the person of Christ." The reference in the caption to the "persona you see before you," appellants argue, is therefore an attack on Christ.

Appellants requested a temporary restraining order, injunctive and declaratory relief, and nominal damages. The district court denied the motion for the temporary restraining order and by consent of the parties consolidated the preliminary injunction hearing with the trial on the merits. After a two-day hearing, the court entered judgment for defendants. Analyzing the question under the three-part test set forth by the Supreme Court in *Lemon v. Kurtzman*, the

district court concluded that the context and content of the statue evinced the secular purposes of broadening the university's educational experience and beautifying the campus. 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). The court further concluded that a reasonable observer would not find that the statue had the primary effect of conveying a message of disapproval of the Roman Catholic religion, and that the context of an "outdoor museum" mitigated any possible anti-religious significance. O'Connor and Strobl appeal the district court's judgment.

Because the annual outdoor sculpture exhibition came to an end in July 2004, *Holier Than Thou* is no longer displayed on the Washburn campus.

III. DISCUSSION

A. Mootness

In their complaint, appellants request declaratory and injunctive relief, nominal damages, and reasonable costs and attorneys fees pursuant to 42 U.S.C. § 1988. Because the statue has now been removed from campus, the claim for injunctive relief is moot. *See Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 548 (10th Cir. 1997). Furthermore, because a declaratory judgment would no longer have any effect on defendants' behavior, the claim for declaratory relief is also moot. *Id.* at 548-49; *see also Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1256-57 (10th Cir. 2004) (holding that an action for declaratory relief was moot when the requested declaration involved past conduct that was not likely to recur).

Appellants argue prospective relief "is not necessarily mooted" because voluntary cessation of allegedly illegal

conduct does not deprive the tribunal of power to hear and determine the case unless defendants can show no reasonable expectation that the wrong will recur. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33, 97 L. Ed. 1303, 73 S. Ct. 894 (1953). This is not a case, however, where the university has unilaterally changed its procedures in an effort to evade judicial review. Rather, as both parties have agreed, *Holier Than Thou* was removed from campus at the prearranged termination date of the annual sculpture exhibition. A defendant cannot be said to have voluntarily ceased allegedly illegal conduct where, as here, the controversy has become moot through the normal course of events rather than through the unilateral action of the defendant. See *DeFunis v. Odegaard*, 416 U.S. 312, 318, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974) (holding the voluntary cessation doctrine inapplicable in a challenge to law school admissions policies when mootness depended not on a unilateral change on the part of the defendant but instead on "the simple fact that [the plaintiff] [was] in the final quarter of the final year of his course of study").

The Supreme Court has also recognized a separate exception to mootness for cases "capable of repetition, yet evading review." *Murphy v. Hunt*, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982). Appellants, however, have not shown that this case is capable of repetition because they have advanced no explanation as to how *Holier Than Thou* will return to the Washburn campus in the future. See *id.* at 482-83 (recognizing that the possibility of recurrence must be more than theoretical). Although it is conceivable that the university could bring some other religiously themed statue onto campus as part of a future sculpture exhibition, this court cannot resolve the constitutionality of a hypothetical future statue given that Establishment Clause questions are heavily dependent on the specific context and content of the

display. *See Van Orden v. Perry*, No. 03-1500, 545 U.S. —, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 1500276, at *13 (June 27, 2005) (Breyer, J., concurring in the judgment) (noting that the constitutionality of a display is dependent on context).

The complaint, however, also includes a claim for nominal damages. An award of nominal damages is an appropriate remedy for a violation of the Establishment Clause. *See Searles v. Van Bebber*, 251 F.3d 869, 878-79 (10th Cir. 2001). Unlike the claims for injunctive and declaratory relief, this claim is not mooted by the removal of the statue from campus. *Utah Animal Rights Coalition*, 371 F.3d at 1257-58. This court therefore has jurisdiction to consider the nominal damages claim.

B. Standing

Because it involves the court's power to entertain the suit, constitutional standing is a threshold issue in every case before a federal court. *United States v. McVeigh*, 106 F.3d 325, 334 (10th Cir. 1997). In order to have standing, a party invoking the court's authority "must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 818-19, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997) (quotation omitted). To demonstrate an adequate personal injury, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) (quotations omitted).

In the context of alleged violations of the Establishment Clause, this court has held that "standing is clearly conferred by non-economic religious values." *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973). The Supreme Court requires, however, that plaintiffs alleging non-economic injury must be "directly affected by the laws and practices against which their complaints are directed." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (quotation omitted). Allegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury. *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989).

Because *Holier Than Thou* was displayed at a prominent location on campus between the student union and the main administrative building, both O'Connor and Strobl claim they were constantly exposed to its presence and were forced to alter their schedules and routes across campus to avoid it. O'Connor testified that the statue was directly between his office and the student union building, and that he was required to walk past it almost every week in order to attend meetings and social events. Strobl testified that the statue was located between his residence hall and the main administrative building, and that therefore he was required to alter his route in order to attend one of his classes, to get postings for student organizations, to reach the registrar's office, and to handle his financial affairs at the school's business office.

Appellants' allegations that they were frequently brought into direct and unwelcome contact with the statue are sufficient to give them standing for an Establishment Clause challenge. *See id.*; *Books v. City of Elkhart*, 235 F.3d 292, 301 (7th Cir. 2000) ("We therefore conclude that a plaintiff may allege an injury in fact when he is forced to view a

religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located."). Their allegations that they were forced to alter their behavior to avoid contact with the display, although not necessary for standing, further support this conclusion. *See Foremaster*, 882 F.2d at 1490-91. Both appellants have therefore alleged sufficient personal injury to challenge the constitutionality of the statue's placement on the Washburn campus.

C. The Establishment Clause

1. Standard of Review

In cases arising under the First Amendment of the United States Constitution, this court reviews a district court's decision *de novo*. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc). In doing so, this court has an obligation to make an independent examination of the whole record. *Id.*

2. The Endorsement Test

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. This prohibition applies to the states under the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15, 91 L. Ed. 711, 67 S. Ct. 504 (1947). The Supreme Court has interpreted the Establishment Clause to "mandate governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-04, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). The Establishment Clause therefore prohibits not only state actions that advance religion, but also actions that are

hostile toward religion. *Lynch v. Donnelly*, 465 U.S. 668, 673, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984).

In *Lemon*, the Supreme Court set forth a three-part test for determining whether a government action violates the Establishment Clause. *Lemon*, 403 U.S. at 612-13. Under this test, "government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement." *Bauchman*, 132 F.3d at 551. Justice O'Connor offered a refined version of the *Lemon* test in her concurring opinion to *Lynch v. Donnelly*. 465 U.S. at 687-94 (O'Connor, J., concurring). Under Justice O'Connor's modified "endorsement test," "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Bauchman*, 132 F.3d at 551 (quotation omitted). In examining challenges to government action under the Establishment Clause, this circuit has interpreted the purpose and effect prongs of *Lemon* in light of Justice O'Connor's endorsement test. *Id.* at 552. A government action is examined under this standard regardless of whether it is alleged to endorse or disparage religion. *Roberts v. Madigan*, 921 F.2d 1047, 1053-54 (10th Cir. 1990). Appellants claim Washburn's placement of *Holier Than Thou* on campus had both the purpose and effect of conveying government disapproval of the Roman Catholic religion.¹

¹ Appellants do not argue that Washburn's actions constitute an excessive entanglement with religion.

While this appeal was pending, the Supreme Court decided two cases in which plaintiffs challenged on Establishment Clause grounds the constitutionality of displaying the Ten Commandments on monuments in public areas. *McCreary County v. ACLU*, 03-1693, 545 U.S. --, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988 (June 27, 2005); *Van Orden v. Perry*, No. 03-1500, 545 U.S. --, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276 (June 27, 2005). The plurality opinion in *Van Orden* upheld the constitutionality of one Ten Commandments display without a discussion of either the *Lemon* factors or the endorsement test. See *Van Orden*, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276, at ¶4 (plurality opinion). Furthermore, Justice Breyer's concurring opinion noted that "no single mechanical formula can accurately draw the constitutional line in every case." *Id.* at ¶12 (Breyer, J., concurring in the judgment). Until the Supreme Court overrules *Lemon*, however, it remains binding law in this circuit. In any case, the Supreme Court's recent opinions establish that an examination of the government actor's purpose, see *McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶10, and the particular context of the display, see *Van Orden*, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276, at ¶13 (Breyer, J., concurring in the judgment), remain relevant considerations under the Establishment Clause. See also *McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶21-22 (O'Connor, J., concurring) (applying the purpose prong of the endorsement test). This court will therefore continue to apply the *Lemon* test as modified by Justice O'Connor's endorsement test, while remaining mindful that there is "no test-related substitute for the exercise of legal judgment." *Van Orden*, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276, at ¶12 (Breyer, J., concurring in the judgment).

3. Purpose

The purpose prong of the endorsement test asks whether “the government’s actual purpose is to endorse or disapprove of religion.” *Bauchman*, 132 F.3d at 551 (quotation omitted). Appellants argue Washburn could have no legitimate secular purpose for placing a statue that mocks the religious beliefs of Catholics at one of the most prominent locations on campus. They further argue that, even if Washburn was unaware of the statue’s anti-Catholic meaning at the time they chose to display it, the school’s failure to remove the statue after receiving complaints from Catholics itself establishes an illegitimate purpose. In applying the purpose prong, courts should look to “the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.” *McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶11 (quotations omitted). Accordingly, this court will examine the history of the statue’s display in an attempt to determine whether the university’s “ostensible and predominant purpose” in displaying the statue was to denigrate the Roman Catholic religion. *See id.* at ¶10.²

² In some situations, the Supreme Court has looked to the context and content of a government display and concluded that “the government action itself bespoke the purpose” of that action. *See McCreary County v. ACLU*, 03-1693, 545 U.S. __, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶12 (June 27, 2005). In *McCreary County*, for example, the Supreme Court looked at the language in a Ten Commandments monument as well as the content of the surrounding display in determining that the state acted with an illegitimate purpose. *See id.* at ¶15-16. In this case, the context and content of the statue is relevant to the effect of the display in addition to the university’s purpose. These factors will therefore be examined in Part III.C.4, *infra*. For the reasons

a. The Selection of the Statue

Appellants have produced no evidence that anyone at the school chose the statue out of hostility toward the Catholic faith.³ Greg Inkman testified that when the three-person jury viewed the slides of *Holier Than Thou*, they did not discuss the resemblance of the bishop's miter to a phallus or any other possible anti-Catholic messages in the statue. When slides of the five sculptures selected by the jury were later shown to the entire Campus Beautification Committee, the minutes show no discussion of *Holier Than Thou*. Jeanette Bertelson, chair of the committee, testified that the statue "was considered to be a very fine piece of bronze, and that basically was it." Until she later heard about the complaints, Bertelson testified that she was not aware of any possible anti-Catholic message in the statue. Similarly, there was no discussion of any anti-Catholic or phallic symbolism when the slides were presented to President Farley for approval.

Washburn argues its decision to display *Holier Than Thou* was motivated by two purposes: 1) to enhance the university's

outlined there, the context and content of *Holier Than Thou* do not suggest that the university's predominant purpose in displaying the work was to denigrate the Catholic faith.

³ The purpose prong of the endorsement test focuses on the intent of the government actor in displaying a particular work of art, not on the intent of the artist in creating the work. *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002). Even if the intent of the artist could somehow be imputed to the state, appellants produced no evidence that the creator of *Holier Than Thou* intended the statue to send an anti-Catholic message. In fact, the artist testified that he intended the statue to be a humorous remembrance of his first sacrament of Penance as a seven-year-old boy.

educational experience, and 2) to beautify the campus. These justifications are consistent with both the educational goals of the university and the mission of the Campus Beautification Committee, and are further supported by the statements of those involved in the selection process. At the special Campus Beautification Committee meeting called after the onset of the controversy, committee members stated that they had seen nothing offensive in the statue and had based their decisions solely on the statue's quality as a piece of art. Bertelson later told the Board of Regents that works for the exhibit were chosen because they exhibited artistic quality, were composed of media appropriate for outdoor display, and were able to engage the viewer and initiate discussion.

Appellants dispute both of Washburn's purported justifications for displaying the statue. They cite the Seventh Circuit's opinion in *Freedom from Religion Foundation, Inc. v. City of Marshfield* for the proposition that campus beautification is not a sufficient secular purpose to withstand challenge under the Establishment Clause. 203 F.3d 487, 493 (7th Cir. 2000). The court in *Freedom from Religion Foundation* examined a fifteen-foot marble statue of Jesus Christ erected on public property and inscribed with the words "Christ Guide Us On Our Way" in twelve-inch block letters. *Id.* at 489. The court relied on *Gonzales v. North Township*, 4 F.3d 1412, 1421 (7th Cir. 1993), which held that the purpose of beautifying a public park could not supersede a monument's predominant religious purpose. *Freedom from Religion Found.*, 203 F.3d at 493. Unlike *Freedom from Religion Foundation* and *Gonzales*, however, there is no evidence in this case that the government actor had any religiously motivated reason for displaying the statue in question. At least when there is no evidence of improper motive, campus beautification is a permissible justification for displaying a work of art.

In response to Washburn's second purported justification, appellants argue that the university's goal of enhancing the school's educational environment was not served by displaying a piece of artwork hostile to a group of students on campus, and that the university could have better achieved its objective by displaying the statue in the campus art museum. Whether the university's chosen methods were the most effective possible means of achieving its goals, however, is irrelevant to the question whether the university was motivated by anti-Catholic intent. *See Lynch*, 465 U.S. at 681 n.7 ("The question is whether the display . . . violates the Establishment Clause.").

b. The Display of the Statue

The university's decision to place the statue at a prominent location on campus does not demonstrate that it was motivated by an improper purpose. Inkemann testified that he chose the site because it had been used in previous exhibitions and because viewers would not be able to appreciate the work's fine details from a distance. He explained that he set the statue apart from others because he believed every statue "needs to be treated as an individual presence" and therefore "needs a certain amount of space." The statue was placed outdoors instead of in a museum, as appellants would have preferred, simply because it was designed for outdoor display and was selected to be part of an outdoor exhibition.

Nor does the evidence show that the statue's caption was selected with anti-Catholic intent. The record establishes that the caption had not yet been placed on the statue at the time it was selected by the Campus Beautification Committee and approved by President Farley. The committee decided to place the statements of the artists on the exhibits not because of hostility toward Catholics, but because the statements in

previous years had been put on brochures that were expensive to print and often wasted. There is no evidence that anything in the caption was motivated by an anti-Catholic purpose.⁴

c. The Decision to Retain the Statue

In the absence of evidence showing an awareness by the university of any possible anti-Catholic message at the time the statue was selected and placed on campus, appellants argue the university's failure to remove the statue after receiving complaints in itself constitutes an improper purpose. A defendant's failure to change its behavior in accordance with plaintiffs' demands, however, is not in itself proof of anti-religious intent. *Bauchman*, 132 F.3d at 556 (rejecting a similar argument as a "‘backdoor’ attempt to substantiate an otherwise flawed constitutional claim").

Furthermore, there is no evidence in the record showing that the university's decision to retain the statue was based on improper motives. Instead, the evidence shows that the university chose to keep the statue for reasons unrelated to a disapproval of Catholicism. In the press release announcing his decision to retain the statue, President Farley explained that there was no solution that would satisfy everyone and that he wanted to take the "opportunity to create a positive educational experience." The meeting minutes of the Board of Regents disclose that their decision was based on a desire to promote freedom of speech and to avoid academic censorship. The minutes of the Campus Beautification Committee show that they were motivated by similar

⁴ The artist testified that he intended the word "persona" in the caption in its ordinary meaning of a person's facade, not, as appellants contend, as a derogatory reference to the "persona Christi."

concerns. Even though the university was certainly aware of the statue's perceived anti-Catholic message at the time it decided to retain the statue, there is no evidence that it agreed with or endorsed this interpretation of the statue.

The evidence also demonstrates that the decision not to move the statue to a less prominent location on campus was not motivated by an anti-Catholic bias. The Campus Beautification Committee discussed the possibility of moving the statue to the campus art museum, but was told there was no room in the museum to accommodate the statue. Washburn's vice-president of academic affairs testified that he also considered moving the statue but was told by complaining parties that nothing short of complete removal from campus would be acceptable. There is no countervailing evidence in the record indicating that the decision not to move the statue was made for illegitimate reasons.

After a thorough review of the record, this court concludes that appellants have presented no evidence in support of their view that Washburn selected or displayed the statue with the purpose of denigrating the Catholic religion. As in *Lynch*, the evidence in this case is simply insufficient "to establish that the [display] is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." 465 U.S. at 680.

4. Effect

The "effect" prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion. *Bauchman*, 132 F.3d at 551-52. The Constitution does not require, however, that the purpose of every government-sanctioned activity be unrelated to

religion. *Id.* at 554 (“Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally.”). Instead, the question of whether the government has endorsed a particular religious display depends in large part on the display’s particular physical setting. *Lynch*, 465 U.S. at 671, 681-82, 685 (holding that a creche in a holiday display did not violate the Establishment Clause because the display also contained secular objects); *see McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶14 (“Under the Establishment Clause detail is key.”); *Van Orden*, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276, at ¶13 (Breyer, J., concurring in the judgment).

Appellants argue the statue’s location next to a footpath at a prominent location on campus, in an area reserved for official use, would lead a reasonable observer to believe the state had endorsed its message. Appellants are correct that these factors weigh toward a finding of state endorsement. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 598, 106 L. Ed. 2d 472, 109 S. Ct. 3086 & n.48 (1989) (holding that a creche’s location in a prominent location distinct from any other decorations resulted in an unconstitutional endorsement of religion).

The effect prong of the endorsement test, however, presumes a reasonable observer “aware of the history and context of the community and forum” in which the display appears. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (quotation omitted); *see McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶14. The awareness of this reasonable observer is not limited to “the information gleaned simply from viewing the challenged display.” *Wells v. City &*

County of Denver, 257 F.3d 1132, 1142-43 (10th Cir. 2001) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (O'Connor, J., concurring in part and concurring in judgment)). The reasonable observer of *Holier Than Thou* would therefore be aware that the statue was one of thirty outdoor sculptures displayed on the Washburn campus, of which several were located within sight of the challenged display. In addition, the existence of a brochure available in the campus art museum describing and mapping all the statues on campus would make it clear to a reasonable observer that the statues were part of a unified exhibit. The reasonable observer would also be aware that art in previous years had been placed at the location of *Holier Than Thou*, and that previous exhibitions had included at least one statue with religious symbolism.

Viewed in the context of these other statues, *Holier Than Thou* was part of a “typical museum setting” that, “though not neutralizing the religious content of a religious [work of art], negates any message of endorsement of that content.” *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). A state is not prohibited from displaying art that may contain religious or anti-religious symbols in a museum setting. *See id.* at 676-77 & 677 n.4 (noting that the National Gallery in Washington exhibits more than 200 paintings with religious themes). A reasonable observer aware that the statue was part of an outdoor art exhibit would not believe the university endorsed the message of any particular piece of art within the exhibit. *See Van Orden*, 125 S. Ct. 2854, 162 L. Ed. 2d 607, 2005 WL 1500276, at ¶13 (Breyer, J., concurring in the judgment) (concluding that a monument containing the Ten Commandments did not violate the Establishment Clause when situated among a group of seventeen monuments and twenty-one historical markers “designed to illustrate the ideals

of those who settled in Texas and those who have lived there since that time" (quotation omitted)); *see also McCreary County*, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 2005 WL 1498988, at ¶17 (noting that the image on the Supreme Court's courtroom frieze of Moses holding the Ten Commandments would not strike an objective observer as taking a position on religion when accompanied by images of seventeen other lawgivers); *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 205 (E.D.N.Y. 1999) ("No objective observer could conclude that the . . . showing of the work of an individual artist which is viewed by some as sacrilegious constitutes endorsement of anti-religious views by the City or the Mayor.").⁵

In *Bauchman*, this court examined the question whether a school choir's performance of songs with religious themes constituted a violation of the Establishment Clause. 132 F.3d at 546. The court considered the "traditional and ubiquitous presence of religious themes in vocal music," together with

⁵ Courts that have held particular works of art to violate the Establishment Clause have tended to focus on the relative isolation of the challenged work from other government-sponsored displays. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 495 (7th Cir. 2000) (holding that a statue in a public park violated the Establishment Clause when "the park was created to display the statue, and the City presented no evidence that other groups have ever used the park to present alternative messages"); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 681, 683 (6th Cir. 1994) (holding that a portrait of Christ in a public school violated the Establishment Clause when it was "not part of a group of paintings"); *Joki v. Bd. of Educ.*, 745 F. Supp. 823, 831 (N.D.N.Y. 1990) ("This is not a case where the school displays the painting as part of a student art exhibit."). In contrast, *Holier Than Thou* is obviously part of a larger exhibit.

the inclusion of a variety of secular songs in the choir's repertoire, to conclude that a reasonable observer would not believe the school's music selection constituted an endorsement of religion. *Id.* at 555. Like music, sculpture has traditionally involved works with religious themes. This fact, combined with the Campus Beautification Committee's selection for the exhibition of four sculptures without obvious religious symbolism, would similarly lead the reasonable observer to conclude that the state did not intend to endorse a particular religious message. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995) ("The guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Summum v. City of Ogden*, 297 F.3d 995, 1011 (10th Cir. 2002) ("[A] reasonable observer would . . . note the fact that the lawn of the municipal building contains a diverse array of monuments, some from a secular and some from a sectarian perspective.").

Furthermore, *Holier Than Thou* was displayed in the context of a university campus, a place that is "peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972) (quotation omitted). In the university setting, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835. As the Supreme Court recognized in *Rosenberger*, purging religious or anti-religious speech from a university setting would eliminate such speakers as Plato, Spinoza, Descartes, Karl Marx, Bertrand Russell, and Jean-Paul Sartre from the curriculum. *Id.* at 836-37; *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 759

(7th Cir. 2001). The Establishment Clause, however, does not compel the removal of religious themes from public education. Although the Court in *School District of Abington Township v. Schempp* held unconstitutional a state statute requiring daily Bible readings in public schools, the Court noted it did not intend to "indicate that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." 374 U.S. 203, 225, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963); *see also Stone v. Graham*, 449 U.S. 39, 42, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (holding unconstitutional a state law requiring display of the Ten Commandments in public school classrooms but noting that religious themes "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like").⁶ Especially in the context of a university campus, no reasonable person would associate the message of *Holier Than Thou* with the state. *See Widmar v. Vincent*, 454 U.S. 263, 274 n.14, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (noting that, as young adults, university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion").

The Seventh Circuit in *Linnemeir v. Board of Trustees of Purdue University* faced a situation similar to the present case in examining the Establishment Clause effect of a student-directed play called *Corpus Christi* at Purdue University. 260 F.3d at 758. The play contained content the court concluded

⁶ Appellants emphasize that public universities are not immune from challenge under the Establishment Clause. This court holds only that, in the context of an art exhibit on a university campus, the display of this statue does not violate the Establishment Clause.

would shock and offend most believing Christians, including a depiction of Jesus Christ having sex with his disciples. *Id.* The court nevertheless found no violation of the Establishment Clause, writing that "the contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd." *Id.* at 759. As the court explained, "if an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a curriculum review committee unto himself." *Id.* (quotation omitted). Appellants attempt to distinguish *Linnemeir* on the ground that the play in that case was produced and run by students for class credit. Merely because *Holier Than Thou* was not created for course credit, however, does not mean it was not part of Washburn's educational curriculum. Both President Farley and Washburn's vice-president of academic affairs testified that they strove to extend the educational environment at Washburn beyond the classroom to encompass various stimuli including art, theater, music, debate, athletics, and other activities.

Regardless of the context in which it is displayed, appellants argue that a reasonable observer would see the content of the statue--a depiction of a bishop with a grotesque expression, a representation of a phallus on his head, and the title *Holier Than Thou*--as a state-sponsored anti-Catholic message. Washburn counters that the statue's message is not anti-Catholic, but merely a representation of the artist's

humorous memories of his first confession.⁷ Ultimately, this court need not determine the proper interpretation of *Holier Than Thou*. Regardless of whether the statue sends an anti-Catholic message, any reasonable observer viewing it in context would understand the university had not endorsed that message. Washburn therefore did not violate the Establishment Clause by including the sculpture in its art exhibition. *See Lynch*, 465 U.S. at 679-80 (holding that the district court's consideration of a display's religious content without reference to its context was in error); *Anderson*, 475 F.2d at 32 ("The Government may depict objects with a spiritual content, but it may not promote or give its stamp of approval to such spiritual content." (quotation omitted)).

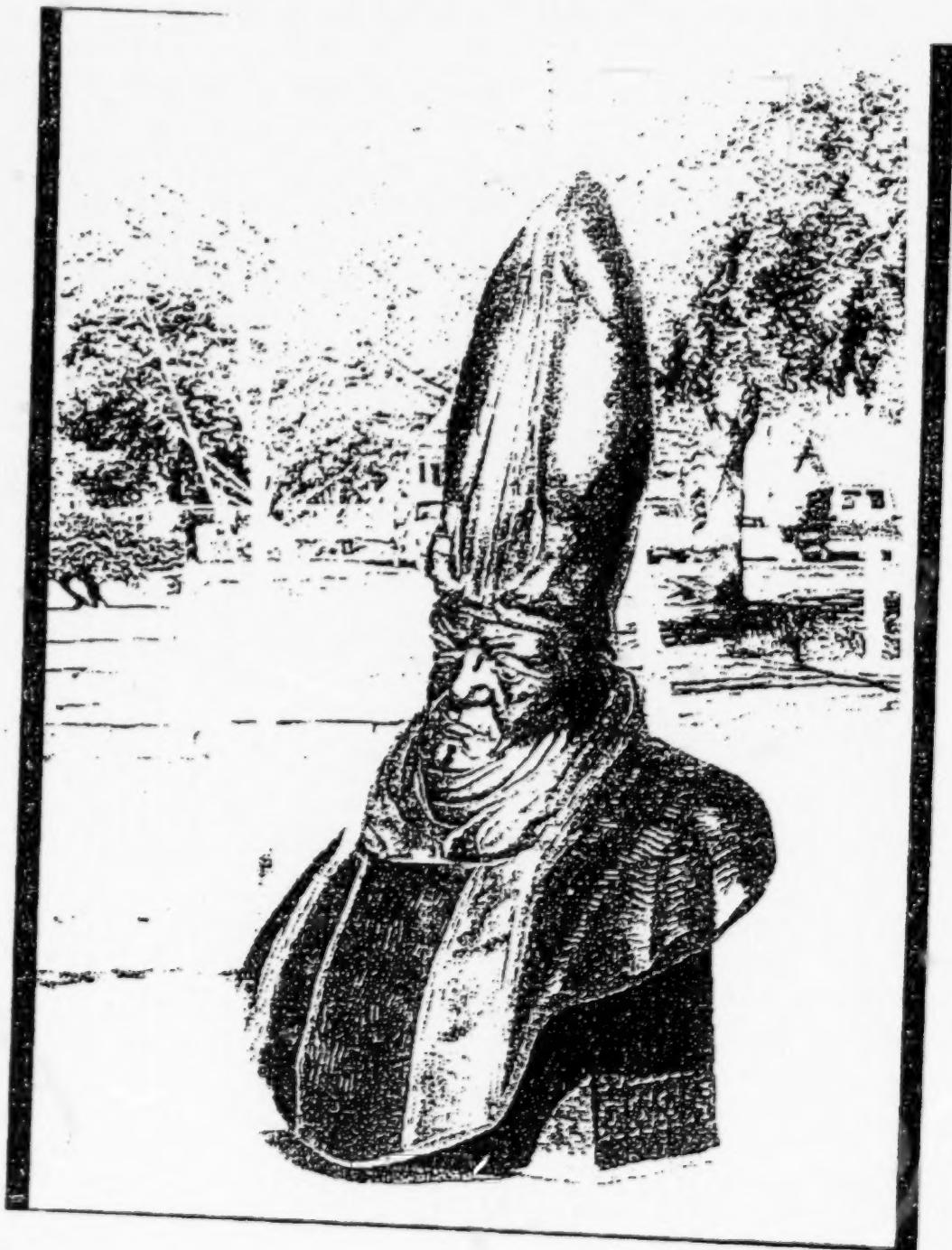
IV. CONCLUSION

For the foregoing reasons, this court DISMISSES the claims for injunctive and declaratory relief for lack of jurisdiction and VACATES the judgment of the district court as to those claims. This court AFFIRMS the judgment of the district court as to the claim for nominal damages.

[SEE PHOTOGRAPH - Fold Out Exhibit next page]

⁷ There is evidence in the record that, while some viewers were offended by *Holier Than Thou*, others did not perceive a phallic symbol or other anti-Catholic message. The unusual seams on the statue's miter have also plausibly been interpreted as a representation of two fish. The effect prong of the endorsement test, however, is a question of law that this court decides without reference to the reactions of individual viewers. *Bauchman*, 132 F.3d at 555.

ATTACHMENT



CONCUR: TYMKOVICH, J., concurring.

I fully concur in the majority opinion. I write separately to express my belief that our Circuit's mootness jurisprudence should be reexamined. In this case, we apply--as we must--two on-point Circuit cases in concluding the appeal is not moot. *Searles v. Van Bebber*, 251 F.3d 869, 878-79 (10th Cir. 2001); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004). But the conduct complained of here has long ceased: the statute has been removed; there is no threat of its return; no one is now being offended. Yet this appeal survives by virtue of a request for nominal damages. In *Utah Animal Rights Coalition*, a panel of the Court debated this very question in two compelling concurring opinions. See 371 F.3d at 1262-1271 (McConnell, J., concurring); 371 F.3d at 1271-1275 (Henry, J., concurring.). I will not repeat those arguments here other than to suggest that federal court jurisdiction should not be exercised in a First Amendment case such as this one where the behavior of the litigants cannot be affected by our resolution of the appeal. I hope the United States Supreme Court or an en banc panel of this Court soon has the opportunity to address this important question.

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
Case No. 04-4001-GTV**

[Filed February 26, 2004]

DR. THOMAS O'CONNOR,)
Plaintiff;)
)
ANDREW STROBL,)
Plaintiff,)
)
v.)
)
WASHBURN UNIVERSITY,)
Defendant;)
)
BOARD OF REGENTS OF)
WASHBURN UNIVERSITY)
AND JERRY B. FARLEY, PRESIDENT,)
Defendant.)
)

MEMORANDUM AND ORDER

OPINION BY: G. Thomas Van Bebber

Plaintiffs Dr. Thomas O'Connor and Andrew Strobl ("Plaintiffs") filed this action pursuant to 42 U.S.C. § 1983

against Defendants Washburn University, Board of Regents of Washburn University, and Dr. Jerry B. Farley (collectively "Defendants"). In their complaint, Plaintiffs allege that Defendants violated the Establishment Clause of the First Amendment by publicly displaying a statue titled "Holier Than Thou" on the campus of Washburn University in Topeka, Kansas, which Plaintiffs claim conveys an impermissible state-sponsored message of disapproval of the Catholic faith and religion.¹ Plaintiffs seek declaratory and injunctive relief to prevent Defendants from displaying the statue, as well as nominal damages. The court conducted a hearing on Plaintiffs' motion for a preliminary injunction, which the court consolidated with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). For the reasons set forth in this Memorandum and Order, Plaintiffs' requests for relief are denied.

I. PROCEDURAL HISTORY

On January 6, 2004, Plaintiffs filed their complaint against Defendants, along with a motion requesting a temporary restraining order and a preliminary injunction enjoining Defendants from displaying the statue in question. The court held a hearing on Plaintiffs' application for a temporary restraining order on January 12, 2004, and denied the request. At that time, the court set the motion for a preliminary injunction for hearing on February 3, 2004. A two-day evidentiary hearing was held, and the parties presented evidence through witnesses, both live and by deposition, and exhibits. At the conclusion of the preliminary injunction hearing, the parties agreed, with approval of the

¹ Plaintiffs assert jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

court, that the preliminary injunction hearing be consolidated with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Since that time, the parties have submitted supplemental briefing.

After carefully considering the arguments of counsel, as well as the testimony of witnesses, the exhibits, and the briefing submitted by the parties, the court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. The Parties

Plaintiff Dr. Thomas O'Connor is a tenured professor of biology at Washburn University. Plaintiff Andrew Strobl is a student at Washburn University and resides at the Living Learning Center, a residence hall for students located on the Washburn campus. Mr. Strobl is also the student president of the Catholic Campus Center at Washburn University. Both Plaintiffs are Roman Catholic.

Defendant Washburn University is a public university located in Topeka, Kansas. Under Kansas law, Washburn is established as a municipal university and is governed by its own Board of Regents. Defendant Board of Regents of Washburn University is a nine-member body that is the governing board of Washburn University and is responsible for appointing the university's president. Defendant Dr. Jerry B. Farley is the President of Washburn University. In this capacity, Dr. Farley proposes policies and makes recommendations to the Board of Regents. Dr. Farley also has the authority to sign contracts on behalf of Washburn, to approve expenditures under \$ 25,000, and to make decisions

to place or remove objects and displays of art on Washburn's campus.

B. The Selection Process for Washburn's Outdoor Sculpture Exhibit

The statue, "Holier Than Thou," was placed on the Washburn campus in September 2003 as a part of the university's annual outdoor sculpture exhibit, and was selected for display by Washburn's Campus Beautification Committee ("CBC"). Composed of community members and Washburn faculty and staff, the CBC was formed in 1994 with the goal of making Washburn University one of the most beautiful campuses in Kansas.² Included in this charge is the CBC's duty to oversee the annual Washburn Outdoor Sculpture Exhibition, which provides Washburn with a diverse selection of sculptures to be displayed on campus each year. To obtain entries for the exhibition, the CBC sent out a call for entries through direct mail and advertisements in sculpture magazines. Sculptors were asked to submit photographic slides of their work together with information concerning the characteristics of each piece. When the deadline for entries had passed, the CBC employed a three-member panel, made up of art professionals, to view the entries and select up to five sculptures to be exhibited. The panel then presented the slides of the finalists to members of the CBC, including the president of Washburn University, Dr. Farley. The CBC notified the winning sculptors, who received a \$1,000 honorarium, and sent them a loan agreement prepared by Washburn. The selected entrants were

² The CBC is not a private entity. The President of Washburn University is responsible for appointing members to the CBC and may override the CBC's decisions.

responsible for transporting the artwork to and from the university, while Washburn University's facilities services personnel installed the sculptures at locations throughout the campus.

In 2003, for Washburn University's Eighth Annual Sculpture Exhibition, the CBC received its highest response ever from artists. Forty-six individuals from sixteen states entered the competition, submitting ninety pieces of artwork for consideration. The five sculptures selected were to be displayed on Washburn's campus from September 2003 until July 2004.³ The CBC accepted the panel's recommendations to exhibit the following five sculptures: "Holier Than Thou," by Jerry Boyle; "Siren," by Randy Olson; "Temporal Dialogue," by Bounnak Thammavong; "The Walking Bods," by Barrett DeBusk; and "Contortion," by Esmoreit Koetsier. Artist Jerry Boyle's sculpture "Holier Than Thou" is the focal point of this lawsuit.

C. The Controversy Surrounding "Holier Than Thou"

On September 20, 2003, Defendants began displaying "Holier Than Thou" at a location between Washburn University's student union and its main administration building.⁴ Jerry Boyle, a resident of Longmont, Colorado, created "Holier Than Thou" in 1990. The bronze sculpture,

³ As with the prior sculpture exhibitions, the five sculptures were not selected for a particular theme, rather as stand-alone pieces.

⁴ The CBC scheduled the official opening of Washburn University's Eighth Annual Sculpture Exhibition for September 27, 2003. In an effort to increase attendance at the event, the CBC decided to coincide the exhibit's opening with Washburn University's Family Day.

which stands thirty-seven inches high and twenty-seven inches wide, depicts the bust of what appears to be a bishop wearing a miter and a stole.⁵ On the back of the sculpture, Mr. Boyle engraved the words "The Cardinal."⁶ In its seven previous exhibitions, the CBC had printed brochures which contained photographs of that year's sculptures, background information about the artist, and a statement solicited from the artist about the particular piece of work. In an effort to print fewer brochures for the eighth annual exhibition, the CBC decided to display each artist's statement under the sculptures. Mr. Boyle's statement mounted below "Holier Than Thou" reads:

The artist says, "I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

Within days of the display of "Holier Than Thou," Washburn University officials received letters, telephone calls, and e-mail messages from persons who complained that

⁵ A miter is the headgear worn by a bishop during religious ceremonies. A stole is the religious garment worn by a bishop during religious ceremonies.

⁶ Before entering "Holier Than Thou" into Washburn's competition, Mr. Boyle displayed "Holier Than Thou" at several sculpture shows, at a gallery in Georgetown, Colorado, and in the downtown area of Colorado Springs, Colorado. A second edition of "Holier Than Thou" is on permanent display at a think tank in Bath, New York.

the prominent and public display of the statue conveyed a message of hostility toward the Catholic community. The main objections asserted by those offended by the sculpture are that: the bishop's miter is distorted and resembles a phallus; the statue and the accompanying statement of the artist mocks the sacrament of Penance and the teachings of the Catholic faith; and the bishop's facial expression conveys a negative, condescending look that contributes to the anti-Catholic message.⁷

President Farley, upon learning of the controversy, met with his executive staff and released a statement expressing the position of the university. The press release states, in part:

One of the pieces on display this year has engendered much discussion. People perceive and respond to art differently based on their individual backgrounds. No one involved in the selection process or in any aspect of the Campus Beautification Committee intended for any viewers to experience pain or hurt. We all regret if this has occurred.

One of the purposes of art is to engage us intellectually and emotionally. This work apparently has fulfilled that function as there is a wide variety of commentary on the piece, ranging from support to opposition.

There is no solution that will be satisfactory to everyone at this point. As a university, we should take this opportunity to create a positive educational

⁷ A more detailed explanation of these objections is presented in the Establishment Clause analysis of this opinion.

experience. Seminars can be organized surrounding this work of art and its symbolism. Speakers could address the aesthetic elements, religious perspectives and issues facing contemporary religions. Different points of view must and can be represented so the seminars are a valuable educational opportunity for the campus and the community.

Despite this response by the university, the controversy and debate surrounding "Holier Than Thou" continued. In early October, Dr. Farley received letters from several Catholic groups, including Archbishop James P. Keleher of the Archdiocese of Kansas City, in Kansas, the President of the Catholic League for Religious and Civil Rights, and from the President of the Archdiocesan Council of Catholic Women for the Archdiocese of Kansas City, in Kansas. Each of these three letters criticized the decision to place "Holier Than Thou" on Washburn's campus, citing the anti-Catholic message that the sculpture conveyed.

Plaintiffs also expressed their dissatisfaction with "Holier Than Thou"'s placement on campus. After first viewing the sculpture on September 23, Dr. O'Connor immediately spoke with Dr. Ron Wasserstein, the Vice President for Academic Affairs at Washburn University, and explained to him why he felt the statue was offensive. On October 3, Dr. O'Connor met with Dr. Wasserstein and David G. Monical, Washburn's Director of Governmental and University Relations. At that meeting, Dr. O'Connor informed Dr. Wasserstein and Mr. Monical that in order to remedy the situation, Washburn University should remove "Holier Than Thou," apologize to the Catholic community, and admit that the university erred when it allowed the sculpture to be placed on campus. During the same time period, Andrew Strobl responded to the university's press release by publishing a letter in *The*

Washburn Review, Washburn's student newspaper. In addition, Mr. Strobl co-signed a letter from the Catholic Campus Center at Washburn University. The letter, which was addressed to Dr. Farley, criticized the university for "creating an environment in which religion can be freely attacked without recourse" and requested the university to immediately remove the sculpture.

D. Washburn University's Final Response

The CBC convened a special meeting on October 7, 2003. The purpose of the meeting was to apprise all committee members of the controversy surrounding "Holier Than Thou." The members were informed of the responses Washburn had received on a national level, as well as responses received from faculty and students. Jeanne Bertelson, chair of the CBC, stated that the CBC would support the statements contained in Washburn's press release.

On October 15, 2003, the Board of Regents of Washburn University held a regular meeting at which Washburn faculty and students, representatives from Catholic groups, and several members of the Washburn community expressed their opinions and viewpoints concerning the statue's presence on campus. At the meeting, Ms. Bertelson provided the Board with a history of the CBC and discussed the selection process for the competition. Ms. Bertelson also mentioned that when she had questioned Mr. Boyle about the sculpture's history, he had stated that there had never been any controversy prior to the placement at Washburn. Charles Engel, a member of the Washburn Board of Regents, also discussed his concerns about "Holier Than Thou." Mr. Engel stated that: Washburn University was not an open forum as it relates to religious issues; that the university was required to remain neutral toward religion as a matter of constitutional law; and that the

university was possibly violating its own equal educational and employment opportunity policies that prohibit discrimination toward several protected classes, including religion. After addressing the Board, Mr. Engel moved to remove "Holier Than Thou" and his motion was seconded. The Board of Regents decided to table the motion and address the issue at a special meeting on October 18, 2003. At the special meeting, the Board again listened to remarks of individuals in favor of and opposed to removing "Holier Than Thou" from the campus. Upon the conclusion of the discussion, the Board voted 5-2 in favor of keeping "Holier Than Thou" on Washburn's campus.

III. CONCLUSIONS OF LAW

A. Standing

As an initial matter, it is necessary to determine whether Plaintiffs have standing to bring this lawsuit pursuant to the Establishment Clause. Standing is a threshold issue and jurisdictional requisite for bringing a case in federal court. *United States v. McVeigh*, 106 F.3d 325, 334 (10th Cir. 1997). "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818-19, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984) (emphasis and brackets in original)).

As a result of being "constantly exposed" to "Holier Than Thou," Plaintiffs maintain that Defendants have caused them "great embarrassment and indignity." In addition, Plaintiffs assert that "Holier Than Thou"'s prominent location on

campus has forced them to alter their regular routes of travel on campus so that they may avoid the statue's anti-Catholic message. Plaintiff O'Connor testified that his responsibilities as a Washburn professor require him to attend meetings and social events that would take him directly past "Holier Than Thou"'s location. Dr. O'Connor acknowledged that he could drive around campus and enter through the "back door" to reach his appointments, but that he refused to be treated like a second class citizen. Plaintiff Strobl testified that he must take an alternate route to evade "Holier Than Thou" to attend one of his classes, to get postings for student organizations, to reach the registrar's office, and to handle his financial affairs at Washburn's business office. Mr. Strobl stated that his alternative route takes him approximately one to two minutes longer than his more direct, preferred route.

In a footnote, Defendants argue that Plaintiffs' injuries "are purely psychological consequences of viewing 'Holier Than Thou,'" and that this "spiritual injury" is insufficient to establish standing under the Establishment clause.⁸ Defendants also argue that it is not clear under case law whether Plaintiffs' claims of having to alter their routines is a sufficient injury to give Plaintiffs standing under Article III. After reviewing relevant Tenth Circuit precedent, the court concludes that Plaintiffs have standing to assert their claims.

"Standing under the Establishment Clause may be predicated on non-economic injury." *Foremaster v. St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (citations omitted). "For Establishment Clause claims based on non-

⁸ For this proposition, Defendants rely on *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982).

economic harm, the plaintiffs must identify a 'personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.'" *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (quoting *Valley Forge Christian Coll.*, 454 U.S. at 485).

In *Foremaster v. St. George*, the Tenth Circuit held that a plaintiff's "allegations of direct personal contact with the offensive action alone" was a sufficient non-economic injury to confer standing under the Establishment Clause. *Foremaster*, 882 F.2d at 1490. The plaintiff in *Foremaster* brought an Establishment Clause challenge to the depiction of a religious temple in the city logo of St. George, Utah. The plaintiff claimed that "'the visual impact of seeing that Temple on a daily basis as part of an official emblem . . . has and continues to greatly offend, intimidate and affect me.'" *Id.* In reaching its decision, the Tenth Circuit noted several decisions in the Seventh Circuit that required plaintiffs to allege a change in behavior to find standing. *Id.* (citations omitted). The *Foremaster* court, however, found the Sixth Circuit's decision in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), as well as its two previous decisions in *Valley Forge*, *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 31 (10th Cir. 1973) and *Bell v. Little Axe Independent School District No. 70*, 766 F.2d 1391, 1398 (10th Cir. 1985) to be persuasive authority for the proposition that a plaintiff need only "allege a direct, personal injury" to satisfy the standing requirement. *Id.*; see *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) ("An Establishment Clause plaintiff need not allege that he or she avoids, or will avoid, the area containing the challenged display").

Following *Foremaster*, the court concludes that Plaintiffs' allegations of direct, personal contact with "Holier Than Thou" provide a sufficient basis for standing under Article III. The fact that Plaintiffs also allege a change in behavior to avoid viewing the sculpture further supports this determination.

B. The Establishment Clause

The First Amendment provides that "Congress shall make no law respecting an establishment of religion" ⁹ U.S. Const. amend. I. "At its core, the Establishment Clause enshrines the principle that government may not act in ways that 'aid one religion, aid all religions, or prefer one religion over another.'" *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 (10th Cir. 1998) (quoting *Lee v. Weisman*, 505 U.S. 577, 600, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (Blackmun, J., concurring)). This requirement of government neutrality toward religion does not mandate "a complete absence of religious expression in public institutions." *Pryor v. Coats*, 2000 U.S. App. LEXIS 1805, No. 99-6271, 2000 WL 147388, at ¶8 (10th Cir. Feb. 9, 2000). "'It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'" *Id.* (citation omitted).

Despite having received considerable criticism, the test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) remains the framework for Establishment Clause analysis. *Summum v. City of Ogden*,

⁹ This constitutional principle was made applicable to the states through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940).

297 F.3d 995, 1009 (10th Cir. 2002) (citations omitted). “Applying *Lemon*, government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement.”¹⁰ *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (citing *Lemon*, 403 U.S. at 612-13). See *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 n.6 (10th Cir. 1995) (“Failure to satisfy any of the three *Lemon* test prongs suffices to support an Establishment Clause violation.”). In *Lynch v. Donnelly*, 465 U.S. 668, 687-94, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984), Justice O’Connor sought to clarify the *Lemon* analysis by focusing on whether the government action endorsed religion. “Applying Justice O’Connor’s refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message [that] ‘religion or a particular religious belief is favored or preferred.’” *Bauchman*, 132 F.3d at 551 (citations omitted).

As the court proceeds to analyze this case under the guidelines of *Lemon* and *Lynch*, the court observes that challenges to the Establishment Clause “are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts.” *Glassroth*, 335 F.3d at 1288.

I. Secular Purpose

¹⁰ The court will not evaluate “Holier Than Thou” under the third prong of the *Lemon* test because Plaintiffs did not argue that the sculpture establishes an “excessive entanglement” between government and religion.

"The purpose component of the endorsement test should evaluate whether the government's 'actual' purpose is to endorse or disapprove of religion." *Bauchman*, 132 F.3d at 551 (citations omitted). The "inquiry into the government's purpose should be 'deferential and limited'" because courts are reluctant to attribute "unconstitutional motives to the government, particularly where [a court] can discern a plausible secular purpose." *Id.* at 554 (citations omitted). The government's articulated purpose, however, must still be "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987). The court must focus on the totality of the circumstances regarding the placement of "Holier Than Thou" on Washburn University's campus. See *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000).

Plaintiffs claim that mocking the religious beliefs of Catholics and "promoting bigotry and hatred toward" Catholicism can never be a legitimate government purpose. Specifically, Plaintiffs assert that Defendants' decision to display "Holier Than Thou" on Washburn's campus undermines any legitimate educational goal. Plaintiffs argue that "Defendants were well aware" of the anti-Catholic message conveyed by the sculpture and its negative effect on Catholics in the Washburn community. In support of this position, Plaintiffs cite the letters Dr. Farley received from Catholic organizations asking Washburn University to remove "Holier Than Thou." Plaintiffs maintain that despite these requests to remove the statue, Washburn's Board of Regents voted to maintain "Holier Than Thou" and "embraced the [sculpture's] message as a meaningful contribution to the 'marketplace of ideas.'" Thus, Plaintiffs conclude, Defendants' own actions establish that their actual purpose was illegitimate. The court is not persuaded by Plaintiffs' arguments.

The court agrees with Plaintiffs' statement that promoting hostility towards Catholics is not a legitimate government purpose. Plaintiffs, however, fail to demonstrate that Defendants' primary purpose in placing "Holier Than Thou" on Washburn's campus was religious. Plaintiffs' arguments focus only on the alleged message conveyed by "Holier Than Thou" and Defendants' decision to keep the sculpture on campus after people objected to its display. Plaintiffs ignore the overall context that guided Defendants' actions in bringing "Holier Than Thou" to Washburn University.

Washburn University's Campus Beautification Committee organized the outdoor sculpture exhibition to advance its primary goal of enhancing the beauty of the campus. Sculptures for Washburn University's Eighth Annual Outdoor Exhibition, like the sculptures in the previous seven exhibitions, were selected by jurors based upon the quality of the artwork and their suitability for the outdoors. Plaintiffs present no evidence that the sculptures were selected as part of a religious theme or in an attempt to communicate a religious message.¹¹ Furthermore, no evidence suggests that Defendants' decision to place "Holier Than Thou" at a central location on campus was predicated on any hostility towards Catholics. Greg Inkman, who provides professional support to the outdoor sculpture competition, testified that in the

¹¹ In fact, section one of the loan agreement artist Jerry Boyle signed states:

"The University, for the *purposes* of fostering appreciation of the arts, bringing attention to its campus and to give artists an opportunity to display their work in public, will exhibit certain pre-selected outdoor sculptures on its campus for a twelve-month exhibition period beginning September 1, 2003 and ending August 31, 2004, or as soon after these dates as practicable."

previous year's exhibition, a sculpture was placed in the same location as "Holier Than Thou." Mr. Inkman stated that he moved "Holier Than Thou" closer to the sidewalk because of its smaller size; he wanted people to see the sculpture's fine details. Finally, as Defendants' brief correctly points out, the decision to mount the artists's statements occurred during the CBC's meetings in the Spring of 2003, well before "Holier Than Thou" was even selected. In prior years, the personal statements appeared only in brochures printed for the exhibition. Members of the CBC determined that they could save money by producing fewer brochures and placing the artists's statement next to his or her sculpture.

The court concludes that the outdoor art exhibit is one segment of the co-curricular activities offered at Washburn University. It functions to aesthetically enhance Washburn's campus, and as Dr. Farley testified, to broaden the educational experiences and to increase the intellectual capacities of Washburn's students. It is correct that "Holier Than Thou," unlike the other four sculptures brought to Washburn's campus, contains what may be perceived to be a religious component. But as Judge Coffey stated in his dissent in *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 775 (7th 2001): "Simply because some religious meaning is conveyed by a monument does not destroy a state's valid secular purposes for its display." Accordingly, the court concludes that the overall context and content of "Holier Than Thou"'s display sustains Defendants' articulated secular purpose, i.e., the display of a work of art. Where there is no evidence that the university has a policy of antagonism to the Catholic religion, the federal courts must defer to educational and artistic judgments that are not invidious. See *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001).

ii. Primary Effect

"The effects prong asks 'whether, irrespective of the government's actual purpose, the practice . . . conveys a message of endorsement or disapproval.'" *Foremaster*, 882 F.2d at 1491 (quoting *Lynch*, 465 U.S. at 687). The determination of whether a government's display has the "principle or primary effect of advancing or endorsing religion" must be evaluated from the perspective of a reasonable observer, aware of the purpose, context, and history of the challenged conduct.¹² *Bauchman*, 132 F.3d at 551-52, 555; see *Foremaster*, 882 F.2d at 1491 (citation omitted) (stating that a court should consider the "particular physical setting" of the display at issue). "This is an objective inquiry, not an inquiry into whether particular individuals might be offended" by the government's actions. *Bauchman*, 132 F.3d at 555; see *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) ("' We do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion.'") (citation omitted) (emphasis and brackets in original).

¹² The court acknowledges that the degree of knowledge possessed by the hypothetical reasonable observer has been the subject of considerable debate. See e.g., *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 n.2 (7th Cir. 2000) (citing cases); *Benjamin I. Sachs, Whose Reasonableness Counts?*, 107 Yale L.J. 1523 (1998). In *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996), the Tenth Circuit applied Justice O'Connor's reasonable observer standard from her concurrence in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772-83, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995). Accordingly, the court adheres to the precedent established by the Tenth Circuit.

Plaintiffs claim that a well-informed reasonable observer would conclude Defendants' display of "Holier Than Thou" conveys an anti-Catholic message. In support of this contention, Plaintiffs rely on the expert testimony of Archbishop James Keleher and the testimony of Plaintiffs.

As the senior Catholic leader of the Archdiocese of Kansas City, in Kansas, Archbishop Keleher is responsible for teaching the Catholic faith and ensuring that others adhere to Catholic traditions. Archbishop Keleher testified to his perception of the harmful effect of "Holier Than Thou" on the Catholic community. First, Archbishop Keleher stated that the headgear worn by the bishop in "Holier Than Thou" appeared distorted and suggested a phallic symbol. He noted that miters are distinctive headgear worn by bishops with authority, and are often worn during major religious ceremonies. Miters, he asserted, are pointed at the top and have seams down the sides—not down the middle as depicted in "Holier Than Thou." Second, the Archbishop testified that Mr. Boyle's statement mocked the role of Christ in the sacrament of Penance. Specifically, the Archbishop objected to Mr. Boyle's references to "the power to condemn" and "persona" contained in the last two sentences of the caption attached to "Holier Than Thou": "I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you." Archbishop Keleher explained that in the sacrament of Penance, the priest speaks in the "persona" of Jesus. The priest is the humble instrument of Jesus, an instrument of forgiveness and reconciliation, not condemnation. Thus, he viewed the sculpture's caption as an attack on the persona of Christ and Jesus's role in the sacrament of Penance. Third, Archbishop Keleher stated that he found the title "Holier Than Thou" to be offensive because

he did not consider himself any better than the person who comes before him during confession. Finally, the Archbishop objected to the bishop's facial expression because it appeared condescending and negative.

Plaintiffs, in their testimony, cited similar objections to "Holier Than Thou." Plaintiff Strobl expressed that "Holier Than Thou" communicated a message of disapproval to him and made him feel like an outsider in the community. Mr. Strobl testified that to him a priest is a servant of God's mercy, but that the sculpture's facial expression appeared as if the bishop was sitting in judgment. He also asserted that the statue's inscription contradicted the teachings of the Catholic faith, that the bishop's miter resembled a penis, and that the sculpture's central location on campus further heightened the anti-Catholic message.

Dr. O'Connor testified that for a practicing Catholic, "Holier Than Thou" is "a jab in the gut." Dr. O'Connor noted that the statue was clearly a religious symbol because it contained the inscription "Cardinal," a position not found in other religious body. Like Archbishop Keleher and Mr. Strobl, he found the bishop's miter and facial expression, as well as the sculpture's caption, to be offensive.

Based on these interpretations of "Holier Than Thou," Plaintiffs argue that an informed reasonable observer would know the following: that during the sacrament of Penance, the "persona" of the bishop is not his own, but he is in the person of Christ; that the traditional miter worn by bishops has been distorted in the sculpture to resemble a phallus; and that the caption's reference to the "persona you see before you" intentionally mocks God the Father. In addition, Plaintiffs contend that the average observer would be aware that other Catholics requested Washburn University officials to remove

the sculpture because of its offensive message, but that Washburn's Board of Regents voted to keep the statue in its current prominent location. Consequently, Plaintiffs contend that the reasonable observer would conclude that Washburn University's display of "Holier Than Thou" has the primary effect of disfavoring the Roman Catholic faith. The court disagrees.

The court does not question the sincerity of Plaintiffs' beliefs. Plaintiffs' arguments, however, concentrate only on the allegedly anti-Catholic message conveyed by "Holier Than Thou" and Defendants' decision to retain the sculpture on campus. Again, Plaintiffs ignore the context, history and overall purpose behind Washburn University's display of "Holier Than Thou." See *Gaylor*, 74 F.3d at 217 (quoting *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring) ("The reasonable observer . . . is the embodiment of a collective standard and is thus 'deemed aware of the history and context of the community and forum in which the religious display appears.'")). Based on the facts of this case, the court cannot conclude that "Holier Than Thou"'s presence on Washburn's campus would cause a reasonable observer to believe that Defendants endorsed hostility towards the Catholic religion.

The court questions the breadth of information Plaintiffs seek to impute to the average observer. See *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring) ("The endorsement test should [not] focus on the actual perception of individual observers, who naturally have differing degrees of knowledge."). Specifically, Plaintiffs' arguments rely heavily on the knowledge a reasonable observer must possess about the Catholic religion in order to find "Holier Than Thou" offensive. As Defendants' brief points out, Plaintiffs "would engraft upon the reasonable observer in-depth

knowledge and sensitivity about the Catholic faith and Catholic doctrine."¹³ The testimony of Archbishop Keleher and Dr. O'Connor support this proposition. At the hearing, the Archbishop stated that "Holier Than Thou" mocked the teachings and the authority of the Catholic church, and that an informed, practicing Catholic would know this and be offended by the sculpture. On cross examination, Defendants' counsel asked Dr. O'Connor if other Catholics might view the sculpture differently. He responded that it would depend if the person was a faithful practicing Catholic or if the person was baptized and merely stated that he or she was a Catholic. The court refuses to assign to the reasonable observer a certain quantitative state of Catholicism. The court is satisfied that "a reasonable observer, without regard to a reasonable observer's degree of understanding," would not consider Washburn's display of "Holier Than Thou" as an endorsement of religion. *Freedom from Religion Found., Inc.*, 203 F.3d at 495-96.

Plaintiffs also request the court to focus on the fact that "Holier Than Thou" is prominently placed between Washburn's student union and its main administration building, with nothing to neutralize its anti-Catholic message. The court is not persuaded that a reasonable observer would perceive the distance between the five exhibition sculptures or the location of "Holier Than Thou" as a disapproval of religion. The "particular physical setting" created by Washburn's campus is comparable to an outdoor museum. A map of Washburn University indicates "Holier Than Thou" shares the campus grounds with twenty-five permanent

¹³ Plaintiffs' supplemental brief states: "[a] reasonably informed Catholic would recognize and understand the anti-Catholic message conveyed by 'Holier Than Thou.'" (emphasis added).

sculptures in addition to the other four sculptures selected for the outdoor exhibition. These other twenty-nine sculptures embrace a variety of secular subjects which only mitigates any religious significance "Holier Than Thou" possesses. See *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.").

The court determines that an objective observer would recognize that Washburn University displayed several pieces of artwork on campus each year as a part of its outdoor sculpture exhibition. In an environment of higher learning on a college campus, the court cannot conclude that a reasonable observer would perceive the university's display of "Holier Than Thou" as an attack on Catholics. The fact that "Holier Than Thou" is a work of art, subject to myriad interpretations, further dilutes any religious meaning the sculpture may convey. The court holds that based upon the totality of the circumstances surrounding "Holier Than Thou"'s placement on Washburn's campus, a reasonable observer would not conclude that the university's display has the primary effect of conveying a message of disapproval towards the Catholic religion.

In sum, the court concludes that Defendants' display of "Holier Than Thou" at Washburn University fails neither the purpose nor effect components of the endorsement test. Accordingly, the court determines that Defendants have not violated the Establishment Clause.

IT IS, THEREFORE, BY THE COURT ORDERED that the clerk enter judgment in favor of Defendants. Plaintiffs' requests for relief are denied.

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Copies of this order shall be transmitted to counsel of record.

The case is closed.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 26th day of February 2004.

/s/ _____
G. Thomas VanBebber

United States Senior District Judge